



Department of Law Monthly Report

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Collections & Support

JUNE COLLECTION ACTIVITY

In June, the Collections unit opened ten APOC cases and closed one civil case. On the criminal side, the unit sent 40 letters responding to inquiries from defendants and courts regarding payment agreements and other collection issues. The unit also prepared for the annual permanent fund dividend attachment by sending approximately 70 writ of execution lists for PFD garnishments to all courts statewide.

The unit opened 156 criminal and 38 juvenile restitution cases for collection. We returned 17 judgments to the issuing courts or the Division of Juvenile Justice due to insufficient information. Initial notices were sent to 319 recipients. Thirty judgments were paid in full. Our office received payments totaling \$75,200.62 toward criminal restitution judgments and payments totaling \$7,286.19 toward juvenile restitution judgments this month. We requested 237 disbursement checks and issued 216 checks to recipients.

In This Issue

COLLECTIONS & SUPPORT	1
COMMERCIAL & FAIR BUSINESS	3
ENVIRONMENTAL.....	4
HUMAN SERVICES ...	4
LABOR & STATE AFFAIRS	6
LEGISLATION & REGULATIONS	6
NATURAL RESOURCES	7
OIL, GAS, & MINING.	8
TORTS & WORKERS' COMPENSATION ...	9
TRANSPORTATION	9
CRIMINAL DIVISION	9
OSPA	12
PETITIONS & BRIEFS OF INTEREST	12
COURT DECISIONS OF NOTE – ALASKA	13

APPLICATION FOR MEDICAID BENEFITS TRIGGERS CHILD SUPPORT SERVICES

AAG Lea Filippi received a favorable decision from the superior court in an administrative appeal from a Department of Revenue decision affirming an administrative support order issued by CSED after the child's mother received Medicaid benefits for the child. The obligor argued, among other things, that CSED did not have the authority to establish a support order for cash support based solely on the mother's receipt of Medicaid benefits. In response, we noted that under state and federal law, a parent's application for Medicaid is considered an application for full child support services unless the parent specifically opts out of those services. The court affirmed the administrative order but invited supplemental briefs to identify the obligee under the administrative support order. Ms. Filippi submitted CSED's supplemental brief identifying the child's mother as the person entitled to support during the period covered by the administrative support order. We are currently awaiting a ruling on this issue.

COURT DISMISSES OBLIGOR'S COMPLAINT

The court dismissed a complaint filed by an obligor (Burnett) who sought relief from CSED's enforcement of his child support obligation. The obligor argued that CSED should not collect arrears from him because he is disabled, blind, was shot, needs oxygen, and needs his driver's license (although his driver's license is not at issue in this case). After a year without activity, the case was scheduled for a two-day trial. AAG Pamela Hartnell appeared on behalf of CSED. When Mr. Burnett did not appear, Ms. Hartnell moved for dismissal with prejudice because Mr. Burnett was asking for relief that cannot be granted. The standing master agreed and recommended a dismissal with prejudice.

FAVORABLE DECISION IN SUPPORT MODIFICATION CASE

The superior court denied a child support obligor's motion under Civil Rule 60(b) for relief from administrative enforcement of support. The obligor filed his motion in April 2003, arguing that his support obligation should be reduced from February 2002 forward because, he claimed, the support amount was not based on his actual income. CSED had an interest in the case because it had filed the motion establishing the support amount and, for some of the months in question, the child had received public assistance. Thus, the obligor was liable to the state for public assistance reimbursement.

AAG Richard Sullivan argued that the obligor's request violated the prohibition against retroactive modification of child support. The obligor sought to avoid this argument by advancing the theory that the prohibition against retroactive modification did not apply to Rule 60(b) motions. The court denied the obligor's motion, treating it instead as a motion to modify support prospectively, and established a new support obligation effective April 2003. The state therefore received the full amount of its public assistance reimbursement.

PROCEEDS FROM SALE OF BUSINESS COUNT TOWARDS SUPPORT

AAG Kevin Williams obtained an order setting an obligor's (Caldwell) child support obligation based on proceeds of the sale of a business. The obligor had received \$600,000 from the sale of his interest in an audio-video company. Before the sale, the obligor had earned around \$65,000 per year. After the sale, the obligor stopped working and has been living off of the sale proceeds. Initially, CSED tried to impute income based on the obligor's three-year wage average before the sale of his business. CSED also imputed income for interest it thought he was earning on the \$600,000. The obligor opposed the motion, asserting that he could not work because of a non-compete clause, signed

as part of the sale of the business that prohibited him from working in the audio-video business within Alaska for at least five years.

Deciding that we could not consider him to be an investor (since he was spending, not investing, the money), and in light of the non-compete clause, we decided to simply divide the \$600,000 from the sale by the five years that he was not going to work under the non-compete clause, and calculate his monthly obligation on this basis. We argued that the obligor had received compensation for this non-compete clause and that he was, in fact, living off of the stock sale. The judge agreed and based the support obligation on an income of \$112,000 per year.

Commercial & Fair Business

REVENUE REQUIREMENT PHASE FOR INTERIOR TELEPHONE CO. AND MUKLUK TELEPHONE CO. RATE CASES SETTLED

A settlement was reached between Interior Telephone Co. (ITC), Mukluk Telephone Co. (MTC,) and the Public Advocacy Section (PAS) of the Regulatory Commission of Alaska in June. The settlement covers the revenue requirement, rate base, and rate or return for these two rural telephone companies.

Both ITC and MTC are subsidiaries of TelAlaska, Inc. ITC provides local telephone service to Fort Yukon, Galena, Cold Bay, Cooper Landing, Unalaska, Iliamna, Port Lions, Sand Point, Moose Pass, and Seward. MTC provides local telephone service to Nome, Elim, Koyuk, Little Diomedes, Golovin, Shishmaref, Shaktoolik, Council, Stebbins, St. Michael, Teller, White Mountain, and Wales.

In the settlement agreements reached, ITC agreed to reduce its proposed operating expenses by \$61,000, and to reduce its depreciation expense by \$21,000. MTC

agreed to reduce its proposed operating expenses by \$30,000, and to reduce its depreciation expense by \$7,000. Both ITC and MTC had also originally requested the commission authorize a rate of return of 12.51 percent based on a 17.36 percent return on equity. In the settlement, ITC and MTC agreed to a rate of return of 11.08 percent based on a 14.5 percent return on equity.

AAG DeVries represented the PAS in this proceeding.

ACPE CLAIM DISMISSED

Virginia Hardham has sued the Alaska Commission on Postsecondary Education (ACPE), the University of Oregon, and several employees of the University of Oregon, claiming breach of contract, deprivation of property without due process, and violation of 43 U.S.C. §1983. Her claims seem to originate from the time she attended the university in the early 1990s. She alleges that the university failed to accommodate her physical problems.

In 1997, she submitted a complaint to ACPE regarding the university and her problems. After investigating the claim ACPE concluded it could not assist her because her complaint was too late and because ACPE had no authority over the University of Oregon. According to an Oregon Assistant Attorney General, this debtor has litigated these very issues in Oregon in at least six cases, all of which were dismissed with prejudice. It would appear that her claims are barred by statute of limitations and claim preclusion. In addition, she cannot bring a 1983 action against a state agency.

AAG Beardsley filed a motion to dismiss for failure to state a claim against ACPE, rather than an answer to the complaint. The Oregon defendants also filed a similar motion based on statute of limitations and *res judicata*. After oral argument on ACPE's motion, Judge Michalski granted ACPE's motion to dismiss and held that Hardham's claims were all barred by the applicable statute of limitations. A motion for

attorney's fees and paralegal costs has been submitted to the court. Hardham has filed an opposition to the motion for fees and costs as well as a motion for reconsideration.

TOBACCO ENFORCEMENT UPDATE

A retailer who sells tobacco products must have a tobacco endorsement on his or her business license, and the endorsement is subject to suspension if the retailer or an employee sells tobacco products to a minor. Recent amendments to the Business License Act brought changes to the hearing process in which retailers can challenge a notice of suspension, and established stepped suspension periods and civil penalties based on the number of convictions for illegal sales. The first hearing under the new provisions took place in Juneau on June 2, 2003, in *In the Matter of Mendenhall Valley Tesoro*. A decision is pending in the case.

Other recent developments in tobacco enforcement include the May 23, 2003, decision by the commissioner of the Department of Community and Economic Development in *In the Matter of Williams Express*, which suspended the tobacco endorsements of four Williams outlets for 20 days each. Williams has appealed the decision to the superior court. Williams also appealed a prior agency decision in which it received suspensions of 45 days at two outlets and 90 days at three outlets, and a decision is pending.

Also issued in May was the DCED commissioner's decision in *In the Matter of Chevron Stations, Inc.*, suspending the tobacco endorsements of one Chevron outlet for 20 days, and for 45 days at a second outlet.

AAG Cynthia Drinkwater represented the Division of Occupational Licensing in these proceedings.

Environmental

HAZARDOUS WASTE REGULATIONS

The Environmental section completed a project to update and simplify the state's hazardous waste regulations in response to a petition from BP Exploration (Alaska), Inc. BP pointed out that the regulations had become so outdated that it was impossible for industry to comply with them. The Department of Law performed the drafting. The new regulations will become effective this summer.

WINDY BAY SETTLEMENT

The F/V Windy Bay was a Seattle based fishing vessel that struck a charted rock and sank in Prince William Sound in July 2001. Although all of the approximately 35,400 gallons of diesel and lubricants on board were discharged into the Sound, the vessel owners completed a prompt and effective cleanup. This was the largest spill in the Sound since the Exxon Valdez. The owners have reimbursed DEC for all of its response and cleanup costs of \$77,486 and agreed to pay a \$16,000 civil assessment in settlement of the state's claims. AAG Alex Swiderski represented DEC.

Human Services

Prisoner Transport and Conflict of Interest Issues in Termination Case Decided by Alaska Supreme Court

In this termination of parental rights case, the imprisoned father, whose rights were terminated, challenged the superior court's decision denying his request to testify in person. The Alaska Supreme Court held that the due process rights of a parent in a termination proceeding are not necessarily violated by

requiring telephonic rather than personal participation.

The court listed several factors to be considered by a trial court in determining whether to grant a prisoner's request to be transported to physically attend a civil trial: the costs and inconvenience of transporting the prisoner, the potential danger or security risk which the presence of the inmate would pose to the court, the substantiality of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, the probability of success on the merits, the integrity of the correctional system, and the interests of the inmate in presenting testimony in person rather than by deposition or telephone. The court analyzed those factors, focusing in this case on the parent's interest in appearing personally (the court found that the father's credibility was not an issue) and the cost to the state (the father was being held in Seward while the trial was held in Bethel) and found that, on the facts of this case, the superior court did not err in denying the father's request for transport.

In a second issue, the father charged that there was a conflict of interest because the children's mother, whose interests were potentially adverse to the father's interests, was represented by a firm that employed a lawyer who had previously represented the father in a criminal matter that provided one of the bases for termination. The supreme court concluded that the superior court abused its discretion in allowing the conflicted firm to represent the mother. The supreme court declined to apply the screening exception found in Alaska Rule of Professional Conduct 1.11 (Successive Government and Private Employment) to attorneys moving from the Public Defender Agency to a private law firm. The court remanded the case for a determination of the effect of the error on the father's case.

AAG Christi Pavia handled the case for the state.

API Reaches Resolution of Litigation with Patient During Trial Number Three

On July 3, 2003, after opening statements in the third trial (a jury trial), API reached resolution of a case involving a petition for commitment for 180 days and a petition for medication. As a result, only one of two Alaska Supreme Court appeals generated from the litigation remains. The litigation has been extensive – approximately 40 motions filed in the superior court case alone.

In February of 2003, Faith Myers' adult children began commitment proceedings concerning their mother. API subsequently filed a petition for 30-day commitment and a petition for medication and alleged that she was suffering from paranoid schizophrenia, and as a result was both a danger to herself and others, and was gravely disabled. API also alleged that Ms. Myers was lacked the capacity to consent to medications.

Ms. Myers hired James Gottstein to represent her. Mr. Gottstein waived her right to confidentiality on her behalf, and set the matter for trial before the superior court where the media was present and observed the proceeding. Superior Court Judge Christen granted both petitions. Myers appealed the order that granted medications to the Alaska Supreme Court. Per Myers' request, the court imposed a stay of the first medication order.

API subsequently filed a petition for 90-day commitment and a second medications petition that both contained similar allegations to the first petitions. The petitions further alleged that Ms. Myers' condition had not improved, and had only worsened due the hospital's inability to administer psychotropic medications. Mr. Gottstein again waived confidentiality on behalf of his client and a second trial was held before Judge Christen. Judge Christen again granted both petitions and imposed a stay of the medications order pending resolution of the appeal of the first medications order before the Alaska Supreme Court.

API's ability to medicate Ms. Myers remained in check, and her conditioned worsened. API then filed a 180-day commitment petition and third medications petition. Mr. Gottstein again waived confidentiality on his client's behalf but this time requested a jury trial. Mr. Gottstein unsuccessfully challenged Judge Christen both preemptorily and for cause, and petitioned the Alaska Supreme Court on the denial of his challenge for cause. The jury trial was scheduled to last at least four days. Shortly after opening statements, the parties reached resolution of the litigation with an agreement to an acceptable less restrictive treatment option that included assumption of her care by a local psychiatrist with standby community mental health services.

As a result of the resolution, the Petition for Review was mooted but the appeal of Judge Christen's first medication petition continues with appellant's brief to be filed shortly. Worthy of note is Mr. Gottstein's substitution of counsel filed just before the jury trial commenced, which substituted "The Law Project for Psychiatric Rights" for himself as counsel of record.

AAG Jeff Killip handled this case from its commencement in February 2003. AAG Mike Hotchkin is handling the appeal of the first medication petition.

Labor & State Affairs

THE OSHA REVIEW BOARD FINES EMPLOYER \$84,000 FOR WILLFUL VIOLATIONS

The OSHA Review Board issued a decision that Whitewater Engineering Corporation willfully violated OSHA regulations and fined the company \$84,000 for the violations. The case stems from an April 1999 fatality when an avalanche killed a worker at Power Creek Hydroelectric Construction Project located

about 10 miles from Cordova. The board found that Whitewater had failed to have a competent person on site who was able to access the avalanche dangers and train workers about avalanche hazards and rescue. Whitewater has appealed the decision to the superior court. AAG Toby Steinberger represents the Department of Labor and Workforce Development in this matter.

FORMER EMPLOYEE CLAIMS CONSTRUCTIVE DISCHARGE

A former employee of the Alaska Commission on Postsecondary Education sued the commission, asserting that he had been constructively discharged when he resigned his employment with the commission nearly six years earlier. We moved to dismiss the suit because the former employee had not presented his claims through the grievance procedures provided under the commission's personnel bylaws. In opposition to the motion, the former employee asserted that he had not known of any grievance procedures during his employment with the commission and, in fact, had unsuccessfully urged the commission to adopt personnel policies. In our reply, we pointed out that the former employee had referred to the commission's personnel bylaws in his resignation letter, and we provided copies of e-mail messages to the former employee indicating that he had participated in reviewing drafts of the bylaws. The former employee's lawyer has since proposed that his client voluntarily dismiss the suit. AAG Dave Jones represents the commission in this case.

Legislation & Regulations

BILL REVIEWS COMPLETED

During June 2003, the Legislation and Regulations section provided legal assistance in finalizing bill reviews for the governor's consideration of legislation. Most of these bill

reviews required coordination and completion within a compressed schedule. The section prepared bill reviews for approximately 130 bills, most before June 13, 2003. We extend our thanks to the assistant attorneys general who put in considerable extra effort to provide timely and thorough legal advice during this important process.

EMERGENCY REGULATIONS REVIEWED

In June, the section prepared several sets of emergency regulations for review and adoption by the Department of Community and Economic Development and the Department of Health and Social Services. These very urgent projects facilitated the distribution of federal funding to communities and citizens that, in the face of state budget shortfalls, need temporary fiscal relief to provide the essentials of daily life and municipal services such as police and fire protection. Projects included Department of Community and Economic Development regulations to distribute federal money to municipalities affected by the loss of state revenue sharing, and also grant municipal infrastructure regulations related to the governor's fisheries revitalization program. The section also prepared regulations for the Department of Health and Social Services to implement the Alaska Senior Assistance Program for low-income seniors adversely affected by the loss of longevity bonus payments.

In addition, the section completed reviews of several regulations projects, including regulations with respect to fish and game, occupational licensing, business organization fees, student consolidation loans, and gas detection for oil drilling and work-over operations.

Natural Resources

STATE RESPONDS TO APPEAL IN LAND SALE CASE

On June 3, the state's brief was filed in the Alaska Supreme Court in *Rush v. State, DNR*, an administrative appeal challenging a decision by the Department of Natural Resources to sell land including the former Big Lake Hatchery site at public auction.

The only remaining issue on appeal is whether DNR erred in applying the former version of AS 38.05.090 to the disposition of improvements on the land in question, currently under lease to a nonprofit organization. Under the version of the statute in effect at the time the lease was executed and extended, upon termination of the lease, the purchaser of the property must compensate the former lessee for the value of property qualifying as "improvements of the lessee" at termination of the lease.

Rush maintains that DNR should have applied the amended version of the statute, to prevent the lessee from realizing a "windfall." The state's position is that retroactive application of the statute is not allowed, where the statutory change affects more than mere procedural rights of the lessee and the legislature did not expressly direct that the statutory amendment be applied retroactively.

AAG John Baker is handling this appeal for the state.

SENIOR HOUSING LAND CASE SETTLED

On June 23, Palmer Superior Court Judge Eric Smith approved the parties' agreement for intervention, settlement, and dismissal in *Palmer Senior Citizens Center v. Alaska Rural Rehabilitation Corp.*

In this case, PSCC sought to divest ARRC of title to land it had acquired from the state,

purportedly for the purpose of constructing senior housing in Palmer. PSCC maintained that ARRC had reneged on a commitment to dedicate the land for senior housing. The state had not been a party to the lawsuit, but agreed to intervene for purposes of settlement, under which the private parties will divide 14.45 acres of land in Palmer, with approximately 7.5 acres subject to a covenant requiring the construction of senior housing facilities.

The agreement settles all outstanding title claims, provides for the assignment of costs of subdivision, and requires all sides to bear their own legal costs. The court will retain jurisdiction until all terms of the settlement are satisfied. The settlement in this 3-year old case was finally precipitated by an all-day settlement conference hosted by the state, presided over by retired Judge James Hanson, and referred to by DNR staff as "Camp David." AAG John Baker represented DNR.

KENNETH H. MANNING V. STATE

Mr. Manning sued in state court, challenging the Tier II hunting permit application scoring process and seeking to halt the Nelchina Caribou Herd hunt until re-scoring is complete. He argues that the scoring decisions unconstitutionally take place of residence into account.

The superior court denied preliminary injunctive relief, and the plaintiff immediately appealed to the Alaska Supreme Court. After the appeal was dismissed because no final judgment had yet been entered by the trial court, litigation again focused at the superior court level. The court then took evidence, and heard argument on a second motion for a preliminary injunction, and denied that motion as well. Mr. Manning next petitioned for review to the Alaska Supreme Court, which the state opposed. The petition was denied. Mr. Manning then brought suit in federal court against the state superior court judge, the state court system, the Department of Fish and Game, and the state's chief justice, under civil

rights theories, arguing that he has been denied a fair trial as well as his subsistence rights. The state successfully moved to dismiss the federal suit. Mr. Manning appealed the dismissal to the Ninth Circuit Court of Appeals.

Meanwhile, the state requested summary judgment in the original state court suit. That motion was recently decided. The trial court upheld two of the challenged regulatory standards and found one to be unconstitutional.

Mr. Manning has also filed another state case accusing Board of Game members, his judge, and an assistant attorney general of violating his civil rights in connection with the initial litigation. AAG Kevin Saxby represents ADF&G.

PERSONNEL

AAG Blaine Hollis resigned from the Juneau Natural Resources section on June 30. He is opening his own practice in Juneau. This is a sad loss for the section, and we wish him well in his new endeavors.

Oil, Gas, & Mining

SUPERIOR COURT 601 ADMINISTRATIVE APPEALS

AAG Charlie Huguelet was successful in the "Sambucca" litigation, upholding a Department of Natural Resources decision denying reduced discovery royalty payments.

AAG Robert Mintz received a favorable ruling denying Greenpeace's efforts to apply regulatory requirements to the permitting of individual wells by the Alaska Oil and Gas Conservation Commission when the entire project had already been properly permitted.

Torts & Workers' Compensation

ALASKA WORKERS' COMPENSATION BOARD UPHOLDS ADMINISTRATOR'S APPROVAL OF RETRAINING PLAN.

After a work injury rendered a Department of Corrections employee unable to return to work, the state paid for the employee's chosen vocational rehabilitation consultant to develop a retraining plan. When the employee refused to accept the plan, the state asked the Reemployment Benefits Administrator to review and approve it. After an extensive review the administrator concluded the plan met the requirements of the Alaska Workers' Compensation Act and approved it.

At the employee's request the board scheduled a hearing to review the plan and rule on the employee's argument that the administrator's approval of the plan had been an abuse of discretion. The state argued that the administrator had acted properly in approving the plan only after considering the applicable legal standards and completing a comprehensive assessment of the facts of the claim. In its June 17, 2003 decision, the board upheld the administrator's action and dismissed the employee's appeal.

AAG Paul Lisankie represented the state in this matter.

STATE WINS DEFENSE VERDICT IN MILLERS REACH FIRE TRIAL

No doubt due to the flurry of legislative activity at the time and an otherwise very busy schedule, this late entry for April failed to be included, but was nonetheless very significant.

Two cases arising out of the June 1999, Millers Reach Fire were consolidated for trial after remand from the Alaska Supreme Court reversing the state's motions to dismiss (*Bartek v. State* and *Angnabooguk v. State*). The

cases were certified as a class action. The case was tried in Palmer, Alaska, to a jury during the months of February, March, and April. On April 30, 2003, after only a few hours of deliberation, the jury returned a unanimous verdict in favor of the Division of Forestry and the State of Alaska. The jury concluded that the state was not negligent in fighting the fire.

The case was defended at trial by the Anchorage law firm of Delaney, Wiles, on contract to the Department of Law.

Transportation

CONDEMNATION CASES SETTLED

DOT/PF settled two condemnation cases relating to the widening of the Parks Highway near Wasilla. AAGs Tom Dillon and Sue Urig represented DOT/PF.

TRANSPORTATION ATTORNEY PAUL LYLE MOVES TO NEW SECTION

Long-time transportation section attorney Paul Lyle moved to the Department of Law's new Opinions, Appeals, and Ethics section after 16 years of service to the Fairbanks Transportation section. Although Paul continues to respond to occasional transportation questions, DOT/PF and the Transportation section will miss his day-to-day advice.

Criminal Division

ANCHORAGE

Second-degree murder charges were filed against two men for the death of a fourteen-year-old innocent bystander. A stray bullet from a gang-related shootout in May caused the death. It is anticipated that the prosecution will

be difficult in light of the current law of self-defense.

Charges were filed against an eighteen-year-old woman for her involvement with two juveniles in extensively vandalizing Diamond High School in May. A man was charged with sexual assault for attacking a woman who was jogging on the coastal trail at 8:30 a.m. in May.

ADA Mike Burke successfully prosecuted Noel Roussel on multiple felony drug and forgery charges for fraudulently obtaining oxycontin from a pharmacy. The jury was in deliberations for approximately fifteen minutes, convicting as charged on all counts.

A man was acquitted of sexual assault after a jury trial. The victim had gone to sleep, and later awoke when she felt fingers penetrating her. The victim initially thought it was her boyfriend, but shortly discovered that it was the brother of her boyfriend, who fled the residence. The victim immediately called 911, and upon being interviewed by police, the brother admitted that the victim had not consented to his actions and that he had sexually penetrated her. But the jury acquitted on all charges, believing that he did not "know" that the victim was asleep the time he sexually penetrated her.

The office continues to work with federal and local law enforcement investigating the hospitalization of a twenty-three-year-old man and the death of a sixteen-year-old girl that resulted from the club drug "GHB."

BARROW

The Barrow grand jury indicted one person for felony DUI and refusal, one person for felony failure to appear, one person for third degree assault, and one person for second degree sexual assault.

Frank Kignak was sentenced to six years with four years suspended for a spree of burglaries on local airline companies, where he broke into

the cargo areas of the airlines and stole alcohol.

Randy Koonaloak was sentenced to twenty-four months after pleading no contest to two misdemeanor charges of fourth degree assault involving domestic violence. He also was found to have violated his probation in other misdemeanor cases and subsequently had an additional twenty-eight months of suspended jail time imposed for a total of fifty-two months to serve.

BETHEL

The Bethel office conducted four jury trials, with convictions of three violent offenses: Jimmy Kelly was found guilty of sexual abuse of a minor in the third degree and attempted sexual abuse of a minor in the second degree. Lambert Lukudak was found guilty of sexual abuse of a minor in the third degree and sexual assault in the third degree. Allen Akaran was convicted of assault second degree. In the only acquittal, a man was found not guilty of two counts of sale of alcohol without a license after a jury trial.

The Bethel grand jury indicted three men for sexual abuse of a minor, including one man for 18 counts; one other man was indicted for sexual assault; two other men were indicted for felony assault; and another man was indicted for felony eluding.

FAIRBANKS

A man was indicted for murder in the second degree in connection with the beating death of a relative. One of the half dozen people indicted for sexual offenses this month was charged with sexual abuse of one of his stepdaughters, and there was evidence that he had molested three other stepdaughters in the past. This defendant denied any sexual intent for his conduct, but stated he would never touch his biological children in that way because "that would be incest."

A man was indicted for attempted sexual assault in the first degree, following an attack on a woman walking along a bike path in Tok. He had been recently paroled after serving time on a prior felony assault conviction in which he randomly shot into a large group of people at an outdoor party.

ADA Jenel Domke secured a conviction against Spike Milligrock for assault in the third degree for strangling the victim to unconsciousness. It took three people to pull him off her.

The utilities manager from North Pole was indicted for felony theft and official misconduct for using on-duty city workers and unlawfully hooking up to city water to assist in the construction of his personal residence.

ADA Corinne Vorenkamp obtained a significant sentence for Matthew Cloyd, who was convicted of felony stalking and thirteen counts of violating a protective order. He received a composite sentence of four and a half years to serve, with two more years suspended.

A woman was indicted for burglary in the first degree. She is charged with or suspected of over a dozen home invasion burglaries in Fairbanks over the past few months.

The grand jury also indicted a jilted lover for assault in the second degree after using a pressure cooker to beat the other woman in the triangle. The assault occurred in the middle of one of Fairbanks' busiest streets.

KENAI

A theatrical production was put on at Kenai Central High School depicting the water-dousing/antiwar protester case in which the defendant was a student. The production, called "A Question of Patriotism," was produced as part of the Alaska Children's Institute for the Performing Arts. The fictionalized plot had almost as many twists as in real life.

KODIAK

A sixty-three-year-old Kodiak man, who had been convicted of misconduct involving a controlled substance in the fourth degree in May, was again convicted of another misconduct involving a controlled substance in the fourth degree by another jury in June. Sentencing on this new conviction has been set for September.

A sixty-five-year-old Kodiak man was convicted of assault in the third degree, and sentenced to twenty-four months in jail with twenty months suspended and placed on probation for five years. He was also ordered to complete residential alcohol treatment.

A twenty-five-year-old Kodiak resident was given a five year suspended imposition of sentence following his conviction on vehicle theft in the first degree. He was sentenced to forty-five days in jail and ordered to pay a fine of \$500 stemming from a February incident in which the owner of the vehicle being stolen used a baseball bat to chase the defendant out of his truck and into a nearby porta-potty.

The June grand jury indicted seventeen defendants on various felony charges including felony custodial interference, perjury, felony assault, misconduct involving a controlled substance, felony theft, and forgery.

PALMER

Phillip Mielke, a pastor in Big Lake, was indicted on two charges of manslaughter. During the early morning hours of April 24, Mielke shot and killed two men with a .44 magnum handgun after he caught them burglarizing the Big Lake Community Chapel. Both men were shot in the back.

A seventeen-year-old was indicted on charges of second-degree murder for the death of another teenager in February, who died from a single gunshot wound to the upper torso. The

defendant initially told Palmer police officers that he was handing the .44 magnum revolver to the victim when it discharged. Later, he admitted that he may have cocked the gun and his finger may have been on the trigger when it fired. He also admitted to smoking marijuana and playing with the gun before the shooting. The defendant's parents have been charged with reckless endangerment for allowing their son to keep marijuana and loaded weapons in his bedroom.

A twenty-nine-year-old woman was indicted on two charges of assault in the first degree and one count of assault in the third degree, for driving her car at approximately 100 miles per hour and hitting two people on a four wheeler. After the collision, the car left the roadway and rolled, ejecting a passenger, who remains paralyzed. Blood was drawn from at the hospital after the incident, and medical records revealed a .129 percent blood alcohol content.

OSPA

(Office of Special Prosecutions & Appeals)

Prosecution News

A woman on probation for welfare fraud was sentenced to serve one year in jail as a result of her third petition to revoke probation, after serving fifteen months on her second petition to revoke probation.

A man received a one-year suspended sentence, was ordered to pay \$8,480 in restitution, and ten years' probation for second-degree theft related to welfare fraud. Another man received a two-year suspended sentence, 250 hours of community work service, was ordered to pay \$44,762 in restitution, and twenty years probation for second-degree theft related to welfare fraud.

Emissions cases resolved. A number of cases involving violations of the vehicle air emissions program in Fairbanks and

Anchorage were resolved. Violators were required to bring their vehicles into compliance and penalties included fines, community work service and, in some cases, donation of vehicles to the Salvation Army.

Petitions & Briefs of Interest

Petitions of Interest

Late disclosure of jury instructions; privilege against self-incrimination. In an emergency petition to the Alaska Court of Appeals, the state sought review of a ruling that allowed the defense to delay its filing of requested jury instructions until after the state had rested. (The state was required to provide its requested jury instructions pretrial.) The trial court ruled that an earlier filing by the defense would infringe on the defendant's privilege against self-incrimination because it would allegedly require the defendant to prematurely reveal her theory of the case. The state argued that jury instructions were not evidence, were not testimonial, and did not give rise to any realistic risk of incrimination; the state also argued that the late disclosure would prejudice its ability to *voir dire* jurors and to respond to inaccurate instructions. The judge reconsidered her decision and reversed herself before the court of appeals could decide the emergency petition for review. *State v. Stewart*, No. A-8623.

Briefs of Interest

Failure to appear; culpable mental states. In a cross-appeal, the state argues that "knowingly" as used in the failure-to-appear statute (AS 12.30.060) does not apply to the defendant's state of mind concerning whether he is legally required to appear. The state argues that it only needs to prove that the defendant recklessly disregarded a substantial and unjustifiable risk that his appearance was

legally required. *State v. Morrow*, No. A-8396/8405.

Burglary or attempted burglary; specification of target crime. The state argues to the Alaska Supreme Court that an indictment is not fatally defective when it doesn't specify the target crime of a defendant's burglary or attempted burglary. As part of its argument, the state asks the supreme court to overrule a contrary holding in *Adkins v. State*, 389 P.2d 915 (Alaska 1964). *State v. Semancik*, No. S-10846.

Extreme-indifference second-degree murder; sufficiency of evidence. The state argues that the defendant's driving his car into a crowd at the entrance of a bar, killing one person, was sufficient to establish extreme-indifference second-degree murder despite evidence that the car was going only 4 miles per hour at the time of the impact with the victim and the building. The state points out in its brief that the car climbed a nine-inch curb before hitting the victim and that the defendant's breath-alcohol level was estimated to be .290 percent. *Kwon v. State*, No. A-8144.

"Serious provocation"; heat-of-passion defense. The court of appeals interpreted "serious provocation," defined in AS 11.41.114(f)(2), as *not* comprising the sum of a series of non-provocative acts or events. *Dandova v. State*, Op. No. 1884 (Alaska App., June 20, 2003).

Court Decisions of Note - Alaska

Statute and Rule Interpretations

Heat-of-passion defense; attempted first-degree murder prosecutions. The court of appeals interpreted AS 11.41.115(a), which specifies that the heat-of-passion defense is available only in prosecutions "under AS 11.41.100(a)(1)(a) [intentional first-degree murder] or AS 11.41.110(a)(1) [knowing second-degree murder]," as also allowing the defense in *attempted* first-degree murder prosecutions. The state is pursuing a petition for hearing to the Alaska Supreme Court over this holding. *Dandova v. State*, Op. No. 1884 (Alaska App., June 20, 2003).